UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DEVORAH CRUPER-WEINMANN

Plaintiff

v. 13 CV 7013 (JSR)

PARIS BAGUETTE AMERICA

Defendant

----------x

New York, N.Y.
January 6, 2014
1:00 p.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

FRANK & BIANCO
Attorneys for Plaintiffs
MARVIN FRANK
BRIDGET HAMILL

TROUTMAN SANDERS LLP
Attorney for Defendant
ERIC L. UNIS
JOSHUA BERMAN
MARY JANE YOON

(In open court; case called)

THE DEPUTY CLERK: Will the parties please identify themselves for the record.

MR. FRANK: Marvin Frank and Bridget Hamill from Frank & Bianco for the plaintiff.

THE COURT: Good morning.

MR. BERMAN: Josh Berman, Troutman Sanders for defendants Paris Baguette.

With me at counsel table are my colleagues Mary Jane Yoon and Eric Unis. I also want to introduce to the Court Mr. Ujin Shin and Dylan Ahn, who are the general manager and vice-president respectively for Paris Baguette.

THE COURT: Good morning. Please be seated.

We are here on the motion to dismiss. Let me hear first from moving counsel.

MR. BERMAN: Thank you, sir.

Good morning, Judge Rakoff.

This is a purported FACTA class action. The law itself, FACTA makes an express distinction between two categories of violation. There are expressly denominated willful violations of the law. There is a separate connect, by the way, reflected in Section 1681 of Subsection N of the statute. There are also an entirely separate category of violations that are denominated by FACTA itself as negligent violations. That is reflected in Section 16810.

THE COURT: So, it seems to me there are two issues here: One is whether they plausibly pled willfulness, and the other is whether they asserted any basis for a class action as opposed to an individual action. Taking the first, they allege that there was partial compliance with FACTA but not total. So, that indicates that your client was aware of the law, but failed to comply with it in some respect, and their argument, as I understand it, is that more likely than not that was a knowing and willful decision.

MR. BERMAN: Let me address that, your Honor.

I do think it has to be addressed together with the other paragraphs in the complaint that purport to address willfulness. So, as I understand their argument, and to sharpen the facts, of the 12 digits on the plaintiff's credit card, Ms. Cruper-Weinmann's, nine were redacted in entirety and only three were left visible. Now, FACTA -- unbeknownst to my clients, FACTA only requires the redaction of the first seven digits. In fact, FACTA permits five of the credit card digits to be unredacted, to be out in the open.

The argument is that my client's overcompliance with the redaction requirement as it relates to the credit card number is ipso facto evidence of my client's willfulness with respect to their technical noncompliance as to the expiration date portion of the receipt.

Now, for what it's worth in our view, Judge Rakoff,

that is just a logical fallacy. It is not correct that my clients were aware of FACTA, and it's not correct that the overcompliance, as it were, with redacting the credit card number shows their intentionality or willfulness with respect to the expiration date; but there is a kind of corollary to that, which is that that allegation, logically flawed as we believe it is, is paired in the complaint or succeeds four paragraphs that relate to the broader history of the enactment of FACTA.

FACTA was widely published by merchants in 2006. The Visa credit card terms of use contain some fine print relating to FACTA. In 2003, a variety of senders made speeches relating to FACTA. Now, at all of those times, my client didn't exist. Paris Baguette did not open in the United States until after all of the hoopla that surrounded the enactment of the law, and the implementation of the law had already occurred.

So this is a company, quite successful in Korea, that decided to establish a chain here in the United States. What happened is they came over here. The first store opened in '07, and they used essentially the same programming partner, which is a Korean company, respected Korean company that is known obviously for complying with the applicable privacy laws, and they were able to engineer a situation where the -- it's called the point of sale system -- or the cash register itself could accept credit cards rather than having a separate credit

card terminal. And, thereby, at the end of the day, that was a great solution because they didn't have to take the receipt from the credit card.

THE COURT: All the stuff you are telling me, this is a motion to dismiss, right?

MR. BERMAN: Yeah, so --

THE COURT: So you can't tell me any of that.

MR. BERMAN: So, even putting separate and aside from that entirely, let me read or let me identify for the Court, respectfully, the way that other federal courts had treated precisely the allegations they make here that compliance was part of the statute is ipso facto evidence of willfulness, not just a non-party --

THE COURT: I'm familiar with those cases. I get the gist, and I apologize for cutting you off, but I think I need to hear from your adversary, and we will come back to you on that.

MR. BERMAN: Thank you, Judge.

MR. FRANK: Good morning, your Honor.

THE COURT: So, if we have here a partial compliance -- your adversary says it's overcompliance, but, in any event, partial compliance/partial noncompliance, why in the world does that give rise to a reasonable, plausible inference of willfulness? Why isn't it just the opposite; that there is no motive, there is no reason why they would comply with part

and not with the other part?

MR. FRANK: I think that recklessness is part of willfulness. I think all the courts hold that, and when you look at *Safeco*, it holds that. What you're looking for --

THE COURT: What do you mean by recklessness?

MR. FRANK: Recklessness is different than actual knowledge. You don't need actual knowledge. You need to be able to just get it wrong not through negligence, but, you see it a lot in securities, right? In securities law --

THE COURT: I'm very familiar with it in securities law, and I don't think -- I don't see where you pled what it's referred to in securities law or the real origin of the term in modern judicial parlance is the model penal code. And what it refers to is a willful blindness. Where do you plead willful blindness?

MR. FRANK: I believe that they were either willfully blind or knowingly blind. In paragraph 30, the language say they had contracts with -- they had contracts with Visa, MasterCard, American Express and the other credit card companies that required them to comply with FACTA.

THE COURT: But the point is -- maybe I wasn't clear on the question I was putting to you. If there had been total noncompliance with FACTA, and you could show or fairly allege that they were told repeatedly that you should comply with FACTA and they didn't, that would support willfulness. I don't

even know you'd have to go to recklessness, but assuming recklessness in the model penal code sense was part of it, it would probably support that. But that's not what we have here.

What we have here is partial compliance but not total compliance. That sounds like negligence. Why in the world -- what motive would they have to comply with the part that they did comply with but not comply with the part that you allege they should have complied with? That is just -- you know, they blew it in terms of negligence, but how can you infer willfulness from that?

MR. FRANK: Every case that both defendant and plaintiff had cited to have had this partial compliance. Defendants cases are --

THE COURT: Well, I'm not bound by any of those cases. I'm asking the question as a question of what plausible inferences can be drawn from your allegations?

MR. FRANK: I think that the only inference -- I don't know what the motive is. I can't give them or attribute to them a motive because I just don't know anything like that, and I haven't had discovery. On the other hand -- and I'm not sure that there is a motive. I don't know at this point in time. On the other hand, certainly they knew about FACTA because they did have this partial compliance. That's where cases generally go; that they know about FACTA, therefore, there should be full compliance, not partial compliance, because it is utterly clear

that you are not allowed to print the expiration date.

It just it seems to me at that point that the exact knowledge that you cannot print anything more than five, the last five digits of the credit card/debit card number, and you're not allowed to print FACTA. And I could go into why they knew they're not allowed to print the expiration date. You know, we have those, or why they would want to comply with one of the two requirements -- and they are independent requirements -- I can't answer that.

THE COURT: I have the gist of your argument.

Let me ask you then a different question. Assuming arguendo you would survive a motion to dismiss, why should this be a class action?

MR. FRANK: The argument that the defendants made is that there was one person, one receipt in one of their stores, and that there is no overt allegations. That's exactly what a class action is meant to do. That's what a class action is all about; that you have a representative party who represents all the absent class members who suffered the same fate as the aggrieved party.

THE COURT: What's your basis for believing that anyone suffered the same fate? If you have a classic class action, like a securities fraud where if the proxy statement sent to a million shareholders was false, then a million shareholders were likely injured. Or in a discrimination class

action, if someone was discriminated against because of some discriminatory employment policy, then there is every reason to believe that everyone of the protected class was discriminated against. But here you don't have anything like that, do you?

MR. FRANK: You have a computer system. These point of sales computer systems that printed out the receipt that was given to the plaintiff at the time of the sales transaction is a computer system that does the same thing over and over and over again. It's a question of how many stores there are. I said, I think in the complaint, at least 20. Then I said in the opposition brief 30 because I counted from the website. Then there is an affidavit that came back that it's 12 or 14. There's a lot of stores. It's a big Korean chain that owns a lot of Dunkin' Donuts franchises and other things that are supposed to know what they're doing. Their computer system produces the same receipt over and over and over again.

THE COURT: OK. That clarifies it.

Thank you very much. I want to hear briefly from your adversary in rebuttal.

MR. BERMAN: Thank you, Judge Rakoff.

As to the first issue, on the question of willfulness and why an inference of willfulness plausibly arises or doesn't plausibly arise here, the argument that the plaintiff is making would quite literally write the possibility of a negligent violation out of the statute entirely, and --

THE COURT: No, no, no, because this is just on a motion to dismiss, and your adversary says there are cases out there that say that context is a plausible inference, and by the end of discovery it may have been erased, and on summary judgment, there may be nothing left of negligence, but this is a motion to dismiss.

MR. BERMAN: So on the law that there are cases out there that accept this inference as evidence of ipso facto willfulness, that is absolutely incorrect; and I rely for that assertion on the precedent cited in the brief. I can recite them to your Honor now.

THE COURT: No, that's OK.

MR. BERMAN: There is a statement that was made in the *Garber* case, that goes directly to this issue. It was on a motion to dismiss, just as this case was here. The court essentially said, you know -- it's interesting, we tried to make sense of the law, and there is no question that in the reported FACTA decisions, there has been a clear shift and the dividing line in the reported decisions is the Iqbal/Twombly line of cases. The pre-Iqbal and Twombly cases which were reported in 2007, some in 2008, permitted extraordinarily bare-bones complaints to go forward.

The post Iqbal cases, *Komorowski*, *Miller-Huggins*, and the *Seo* case, maybe most poignantly, the *Garber* decision, have dismissed complaints that are virtually verbatim with this

complaint, and, in fact, incorporate the precise kind of misinference that --

THE COURT: Did you want to say anything on the class certification question to the extent it's before me at this point?

MR. BERMAN: Only very briefly, sir, if I may.

I agree entirely with your Honor that there is no allegation in the complaint that relates to the kind of classic class action scenario.

THE COURT: They say it's a computer -- there is every reason to believe that this computer program was used across the board.

MR. BERMAN: But there isn't every reason to believe that. In fact, there are differences with the way particular stores are set up. For instance -- and, again, this gets into some factual questions, but we get the --

THE COURT: I can't consider anything that is not fairly contained in the complaint.

MR. BERMAN: In order to reach the conclusion of a proper class, the Court would have to accept plaintiff's counsel's representation that the computer system is the same or there's an inference the computer system is the same across Paris Baguette stores. That's just made up.

The reality is some stores have a terminal that can both take the receipt and process the credit card. Other

stores have a credit card terminal that is provided by a different vendor. The point is in order to get there --

THE COURT: I get the point. I apologize to both counsel for keeping you on a fairly short leash, but I had a particularly full calendar today. This was a very helpful argument for both sides.

So, I will take the matter under advisement. I will get you at least a bottom-line decision no later than January 20, two weeks from today. It may be a full opinion. If it is not, a full opinion will follow, but at least you will know the bottom line, and then you can continue or not as to depending which way the court decides.

MR. BERMAN: Judge Rakoff, if I may, there is one other issue that I think is properly addressed today. Very quickly.

THE COURT: Go ahead.

MR. BERMAN: When we last spoke, we spoke by teleconference on November 14. What we had asked for on behalf of Paris Baguette was a stay of discovery pending the Court's disposition on our motion to dismiss. I believe I'm stating this entirely correctly, I hope the Court agrees with my recollection, but what your Honor did, is you said to plaintiff's counsel, look, I don't stay discovery. It's not my practice to do that. I'm going to give you a choice. Either you can consent to a stay of discovery, or if you don't, I'm

going to enter the scheduling order before me, and I'm going to put everybody on an expedited briefing schedule and an expedited oral argument schedule.

And plaintiff's counsel opted for option B. We went on a very expedited schedule. We're here for oral argument in approximately six weeks.

The case management plan that your Honor entered on November 14 set forth a final date for serving document requests and interrogatories on December 17.

THE COURT: Yes.

MR. BERMAN: That was an order of the court. And the plaintiffs just didn't comply with it. We were not served with discovery requests on that date. In fact, we were not served with discovery requests in compliance for several days later. Paris Baguette did comply. Unfortunately, the Court said no stay. We did comply, and we think it is not unrelated to the matter in which this is --

THE COURT: So, here I think -- without getting into whether they complied or didn't comply -- I think the following makes sense, since I am going to decide this within two weeks:

All discovery is stayed in all respects for between now and January 20. If I dismiss the case on January 20, obviously, that's the end of that.

If I deny the motion on January 20, then counsel should immediately jointly call my chambers, and we will reset

the discovery schedule in a way that makes sense for both sides without any arguments about waiver or anything like that. We will just reset the whole schedule. OK?

MR. FRANK: Your Honor, if I may have one minute? As far as the January 20 -- obviously, I disagree with what counsel said.

THE COURT: I know. That's why I cut off that.

MR. FRANK: As far as what happens on January 20, I just hope if the case is dismissed we're given leave to replead.

THE COURT: What else would you plead?

MR. FRANK: Well, the one thing that was a fact that I did put in the opposition brief that is not in the complaint, and is improperly in the opposition brief, that after the complaint was filed, we received a letter from Paris Baguette's insurance company stating that there was no insurance coverage because the company had negotiated an insurance policy with a specific FACTA exclusion. So, therefore, it's utterly clear that senior management of Paris Baguette was aware of FACTA in --

THE COURT: Let me just say this: Notwithstanding defense counsel's argument, I think the complaint as it presently stands raises a plausible inference that Paris Baguette was fully aware of FACTA. So, that's not going to be the issue.

The issue what is willfulness, and whether or not it has been pled there. That's why I asked you, is there anything else you had on that issue that you wanted to plead.

I understand this is -- every plaintiff's counsel in the world has been put in this bind by Iqbal and Twombly, like I asked you before about motive, and you correctly said, we don't know what their motive was, if any, we would only find that out in discovery. Agreed. But that is, unfortunately, not the end of the issue because I have to -- while motive is not an element, I am just giving that as an example. I have to decide this on what you presently know and can fairly plead. So, you may have pled enough. What I am asking is there anything else you would have pled, and what you are telling me is you would have pled more about their knowledge of FACTA. I'm saying you don't have to do that because I think you've pled enough on that already. That issue can survive dismissal. The issue is willfulness. Is there anything else you would have pled on willfulness?

MR. FRANK: The reason I threw in the insurance policy is the cases that allowed the FACTA decision to go forward, the FACTA cases to go forward, all looked towards information that went to the specific defendants and not the general -- there are a lot of cases out there, don't get me wrong, *Dover*, and I think *Katz* that allow general information, especially after ten years, for those cases to go forward, denied on a motion to

dismiss.

But there are other cases, like *Troy* and *In Re: TJX* that required a specific piece of knowledge that was given to that defendant about FACTA. So, I did say in paragraph 39 of the complaint that the company was made aware by the contract with the credit card issuing companies, they're a requirement, and now this insurance company thing, that something that went directly to the company that made it plausible was that they willfully refused to follow the FACTA law. So, that is why I threw it in there.

THE COURT: All right. I will factor into my ruling on the 20th that -- of course, I have no idea yet where I am coming out on the merits, so to speak; but if I come out against you, I will then consider whether based on what you just told me I would allow an amended complaint or not.

So, thank you for raising that.

MR. BERMAN: Judge, if I may just have a word about this insurance communication? I have to, for no other reason than to protect the record, I understand the Court will consider it as it will consider it, but the communication in question was sent in error by my client's insurance company who misunderstood which counsel which represented which party, and it is quite distressing --

THE COURT: That may be, but that is certainly not something I can consider. If they can plead it, as they

represented they can --

MR. BERMAN: They certainly couldn't plead it when they filed this complaint.

THE COURT: Well, as I understand it, they can plead the receipt of this letter. You are saying the letter was sent in error. That may be. That may not be. It's neither here nor there.

MR. BERMAN: What I am saying it's sent by counsel for the insurer to who they believe to be counsel to the plaintiff, and it ought not be admissible because it should have been clawed back. We immediately sent a letter -- I don't remember honestly if it was letter or email --

THE COURT: I hear you. Very good. Thanks very much.

(Adjourned)